SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ALTERRA AMERICA INSURANCE CO., Plaintiff, v. NATIONAL FOOTBALL LEAGUE, et. al. Defendant.	Index No. 652813/2012 **E** Hon. Andrea Masley Motion Seq. No. _____
DISCOVER PROPERTY & CASUALTY COMPANY, et al., Plaintiffs, v. NATIONAL FOOTBALL LEAGUE, et al., Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW CAUSE FOR A PROTECTIVE ORDER AND A TEMPORARY RESTRAINING ORDER

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The Non-Party Teams[1] respectfully submit this memorandum of law in support of their motion for a protective order pursuant to CPLR 3103(a): (a) directing the Insurers to withdraw or stay all other proceedings they have commenced in any other jurisdiction against any of the Non-Party Teams seeking to compel compliance with the subpoenas issued to each of the Non-Party Teams (the "Subpoenas"); (b) directing the Insurers not to commence any other proceedings in any other jurisdiction to compel compliance with the Subpoenas; and (c) consolidating all proceedings relating to the Subpoenas into a single proceeding before this Court. The Non-Party Teams also seek a temporary restraining order ("TRO") to temporarily enjoin the Insurers from litigating issues relating to the Subpoenas in other jurisdictions so as to maintain the status quo while this Court rules on the Non-Party Teams' motion for a protective order.

PRELIMINARY STATEMENT

This motion is necessitated by the fact that the Insurers have or are in the process of commencing and/or prosecuting 32 separate proceedings in 22 different states, *including two New York proceedings before this Court*, to compel compliance with 32 nearly identical Subpoenas that all seek voluminous and burdensome third-party discovery from the Non-Party Teams. Currently, Insurers have filed motions to compel against 21 Non-Party Teams in 14 States, including New York. Litigating essentially the same discovery issues in 32 duplicative discovery proceedings across the country is incredibly inefficient, a colossal waste of judicial resources, and subjects all parties to the risk of inconsistent and potentially contradictory rulings in a multitude of jurisdictions. The Insurers started filing these duplicative proceedings without

[1] Unless otherwise defined in this Memorandum of Law, all defined terms have the meaning ascribed to them in the Affidavit of Irreparable Harm of Seth B. Schafler, Esq., dated April 25, 2019.

warning in courts across the country in early April 2019 after being totally silent on any attempt to achieve an accommodation with the Non-Party Teams since November 2018. The Insurers have rejected the Non-Party Teams' proposal to consolidate all of these discovery proceedings before this Court on an agreed schedule, necessitating this motion.

Recently, as this Court is aware, Special Referee Dolinger issued an 81-page decision addressing many of the same discovery disputes that the Non-Party Teams and the Insurers have been meeting and conferring about for the last year. Certain of the issues involved in this ruling are on appeal to this Court. In addition, two of the Non-Party Teams, the New York Football Giants, Inc. (the "Giants") and the Buffalo Bills, LLC (the "Bills") are located in New York, and the Insurers have submitted their motions to compel with respect to these Teams to Special Referee Dolinger. Consequently, Special Referee Dolinger will initially be addressing the issues relating to virtually the identical Subpoenas of which the Insurers are also seeking to compel compliance in courts around the country, which lack Special Referee Dolinger's and this Court's familiarity with the issues involved in this case.

Shortly after Special Referee's Dolinger's decision as to party discovery was issued, the Insurers, without any forewarning or effort to meet and confer in good faith with the Non-Party Teams in light of that ruling, and after radio silence for nearly five months, began filing a mass of duplicative actions across the country to compel enforcement of the Subpoenas. To date, the Insurers have commenced 18 separate proceedings against 21 Non-Party Teams in 14 different States, and confirmed that they intend to commence separate actions against all of the remaining Non-Party Teams in each of their respective local jurisdictions.

To avoid unnecessary burden and expense, waste of judicial resources and the risk of inconsistent decisions, and because the Insurers had themselves already directed to Special

Referee Dolinger their motion as to the Bills and the Giants, the Non-Party teams offered to submit to the jurisdiction of this Court to adjudicate all issues relating to all of the Subpoenas in a single proceeding, and to meet and confer in an effort to resolve open issues. The Insurers, however, flatly rejected this proposal, necessitating this motion.

The Non-Party Teams will face immediate and irreparable injury unless the Insurers' multiple proceedings to compel compliance with the virtually identical Subpoenas are consolidated in one proceeding before this Court and the Insurers are enjoined from litigating such issues in numerous other jurisdictions. As noted, the Non-Party Teams will be forced to litigate identical discovery issues in 32 separate court proceedings in 22 different states, and run the risk of being subjected to discovery rulings that are inconsistent from those already made in this Court and those that may be rendered in other jurisdictions, which could impact all of the Non-Party Teams. For example, if one or more Non-Party Teams are required to produce Defense File materials, it would seriously impact the privileged nature of those documents held by other Non-Party Teams and/or the NFL with whom such documents may have been shared on a common interest basis, thus mooting or severely undermining the privilege rulings of this Court.

The threat of irreparable harm is not some distant concern. For example, on April 22, 2019, the Insurers filed a discovery proceeding in Indiana state court against the Indianapolis Colts to compel compliance with the Subpoena issued to that team, and the Indiana court issued an order *that same day* requiring production of all responsive documents within 30 days – *without a hearing or providing the Indianapolis Colts with any other opportunity to be heard.* The Indianapolis Colts are now preparing papers seeking reconsideration of that ruling. In addition, a hearing was scheduled in Pennsylvania state court for April 25, 2019 in a proceeding

against the Philadelphia Eagles, and only at the last minute did the Insurers agree not to pursue that motion without prejudice when that court refused to adjourn that hearing on consent of the Philadelphia Eagles and the Insurers. Moreover, there are additional imminent deadlines. Just by way of example: (a) there is a hearing currently scheduled in the Illinois action against the Chicago Bears for May 6, 2019; (b) another hearing is currently scheduled in the Pennsylvania action against the Pittsburgh Steelers for May 10, 2019; and (c) there are May 13, 2019 deadlines in the two Maryland proceedings against the Baltimore Ravens and the Washington Redskins.

Accordingly, the Non-Party Teams request that the Court issue a protective order: (a) directing the Insurers to withdraw or stay all other proceedings to compel compliance with the Subpoenas; (b) directing the Insurers not to commence any other proceedings to compel compliance with the Subpoenas; and (c) consolidating all proceedings relating to the Subpoenas before this Court.

Additionally, given the immediacy of the upcoming deadlines in the other actions, it is critical that the Court grant the Non-Party Teams' request for a TRO to temporarily enjoin the Insurers from litigating issues relating to the Subpoenas in other jurisdictions so as to maintain the status quo while this Court rules on the Non-Party Teams' motion for a protective order.

STATEMENT OF FACTS

The facts relevant to this application are set forth in the accompanying Affirmation of Irreparable Harm of Seth B Schafler, dated April 25, 2019.

ARGUMENT

I. The Court Should Issue A Protective Order To Prevent Unreasonable Annoyance, Expense, Embarrassment, Disadvantage, Or Other Prejudice

The Non-Party Teams respectfully request that this Court issue a protective order pursuant to CPLR 3103(a) that would consolidate all pending discovery proceedings regarding

the Subpoenas into one, single proceeding before this Court before which the Insurers are already seeking relief as to the Bills and the Giants. As non-parties against whom discovery is sought relevant to the Coverage Actions pending before this Court, the Non-Party Teams clearly have standing to seek such relief. *See* CPLR 3103(a) (the Court may "*on motion ... of any person from whom or about whom discovery is sought*, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device.") And such an order is necessary and warranted to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to" the Non-Party Teams and the courts in the 32 separate proceedings in 22 different states where the Insurers have stated they intend to commence duplicative actions to compel compliance with the Subpoenas. CPLR 3103(a).

New York courts have routinely enjoined parties from proceedings in other states or countries where doing so would prevent duplicative litigation, waste judicial resources and cause the parties to incur unnecessary expenses, and potentially result in inconsistent rulings. *See, e.g.*, *IRB-Brasil Resseguros S.A. v. Protobello Int'l Ltd.*, 59 A.D.3d 366, 366-67 (1st Dept. 2009) (affirming trial court's enjoinder of party from prosecuting its action in foreign country where such would have led to a "waste of judicial resources, unnecessary legal expenses and duplicative litigation that might lead to conflicting results."); *Certain Underwriters at Lloyds, London v. Millennium Holdings LLC*, 52 A.D.3d 295, 295-96 (1st Dept. 2008) (enjoining party from pursuing parallel proceedings in Texas); *Jay Franco & Sons Inc. v. G. Studios, LLC,* 34 A.D.3d 297, 298 (1st Dept. 2006) (holding that trial court did not abuse its discretion by enjoining party from pursuing California action).

This is particularly the case in the context of non-party discovery proceedings where New York federal courts routinely require parties to litigate non-party discovery issues in the forum in

which the underlying action is situated given such court's familiarity with the underlying issues and the need for that court to manage its docket. *See, e.g.*, *Cadence Pharms., Inc. v. Multisorb Techs., Inc.*, No. 16MC22G, 2016 WL 4267567, at * 5-6 (W.D.N.Y. Aug. 15, 2016) (transferring New York discovery action to compel non-party's compliance with subpoena to Delaware, where the main action was proceeding); *Fed. Deposit Ins. Co. v. Axis Reinsurance Co.*, No. 13 Misc. 380(KPF), 2014 WL 260586, at * 3 (S.D.N.Y. Jan. 23, 2014) (transferring New York discovery action to compel non-party's compliance with subpoena to Georgia, where the main action was proceeding); *Patriot Nat'l Ins. Grp. v. Oriska Ins. Co.*, 973 F. Supp.2d 173, 175-76 (N.D.N.Y. 2013) (transferring New York discovery action to compel non-party's compliance with subpoena to Florida, where the main action was proceeding and which court is "far better positioned to hear arguments relating to whether the disputed subpoena *duces tecum* seeks documents that are relevant to the underlying action."); *Stanziale v. Pepper Hamilton LLP*, No. M8-85 (PART 1)(CSH), 2007 WL 473703, at * 5-6 (S.D.N.Y. Feb. 9, 2007) (transferring New York discovery action to compel non-party's compliance with subpoena to Delaware, where the main action was proceeding and where issues of privilege and cost-sharing were to be decided and the judge in the main action already has faimiliarity with such issues).

All of the CPRL 3103(a) factors are present. On February 26, 2019, Special Referee Dolinger issueed an 81-page ruling, portions of which are pending on appeal, which addressed issues concerning privilege and scope of production that will also be relevant to the documents sought in the Subpoenas. In addition, the Insurers have, of necessity, submitted issues concerning the Subpoenas served on the Giants and the Bills to Special Referee Dolinger, who will, perforce, be addressing the same issues the Insurers have submitted to courts around the country.

Litigating the same issues with respect to the virtually identical Subpoenas against the Non-Party Teams in multiple jurisdictions will clearly result in unreasonable annoyance, expense, disadvantage, and prejudice to the Non-Party Teams and the courts in the 32 separate proceedings in 22 different states where the Insurers have confirmed their intent to commence and/or continue prosecuting duplicative actions to compel compliance with the Subpoenas.

Moreover, such collateral litigation runs the real risk of interfering with this Court's management of its docket in the Coverage Actions. In light of Special Referee Dolinger's ruling, on March 19, 2019, the NFL and the Insurers entered into a stipulation that was So Ordered by this Court that extended various discovery deadlines, including the date for completion of all fact discovery to April 30, 2020. (Index No. 652933/2012, Dkt. No. 532 at ¶ 2.) If the Insurers are permitted to litigate discovery issues across the country, with all of the varied and separate appeals processes, it is highly unlikely that this deadline could ever be met, and this Court may be held hostage to indefinite delays necessitated by the need to wait for final discovery rulings from courts in other jurisdictions.

In the meantime, the Non-Party Teams are facing immediate and irreparable injury by having to litigate identical discovery issues in 32 separate court proceedings in 22 different states, with the real possibility of this resulting in a variety of inconsistent discovery rulings that may obligate one or more of the Non-Party Teams to have inconsistent discovery obligations, including a potential requirement to produce documents that Special Referee Dolinger previously held were either not required to be produced (*e.g.*, certain indemnity and damages-related documents) or were held to be privileged (*e.g.*, the Defense Files). For example, if one or more Non-Party Teams are required to produce privileged or protected communications with the NFL, it would seriously impact the privileged nature of those documents held by other Non-Party

Teams and/or the NFL, itself.

In short, there is no legitimate reason not to consolidate all of the Insurers' proceedings to compel complaince with the Subpoenas before this Court, as (a) this Court has the most knowledge of the underlying issues involved in the Coverage Actions pending before it, (b) there has already been extensive motion practice in this Court on several discovery-related issues, certain of which will directly impact on the proper scope of the Subpoenas, and (c) consolidation will conserve judicial resources, avoid duplicative and wasteful litigation and avoid potentially inconsistent rulings on the same discovery issues. The only potential reason for the Insurers to reject consolidation, other than to burden and harass the Non-Party Teams, is their hope that by relitigating the same issues before different courts, they will produce more advantageous discovery rulings in other jurisdictions less familiar with this matter than they or will receive in this Court. This Court, however, should not countenance such improper forum-shopping and abusive litigation tactics.

II. A TRO Is Necessary To Avoid Inconsistent Discovery Rulings That May Undermine This Court's Discovery Rulings

The Non-Party Teams easily satisfy the traditional prerequisites for injunctive relief: (1) a likelihood of success on the merits; (2) irreparable injury if the injunction is not granted; and (3) a balance of the equities in their favor. *See* CPLR 6301; *Nobu Next Door, LLC, v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839, 840 (2005); *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 862 (1990); *J.A. Preston Corp. v. Fabrication Enters., Inc.*, 68 N.Y.2d 397, 406 (1986); *Invesco Institutional (N.A.), Inc. v. Deutsche Inv. Mgmt. Ams., Inc.*, 74 A.D.3d 696, 697 (1st Dept. 2010).

A. The Non-Party Teams Will Be Irreparably Harmed By Having To Litigate The Same Discovery Issues In 32 Separate Proceedings In 22 Different States

For the reasons stated in Point I, above, the Non-Party Teams have established that they will be irreparably harmed absent this Court granting the injunctive relief requested in their

motion. For the same reasons, the Non-Party Teams have shown that a TRO should be entered because "immediate and irreparable injury, loss or damages will result unless [the Insurers are] restrained before a hearing can be had." CPLR 6313.

B. The Non-Party Teams Are Likely To Succeed On Their Objections To The Subpoenas

To demonstrate a likelihood of success on the merits, the Non-Party Teams need only make a *prima facie* showing of their right to relief. *Invar Int'l, Inc. v. Zorlu Enerji Elektrik Uretim Anonim Irketi Sirketi*, 86 A.D.3d 404, 405 (1st Dept. 2011); *Unique Laundry Corp. v. Hudson Park N.Y. LLC*, 55 A.D.3d 382, 383 (1st Dept. 2008); *Terrell v. Terrell*, 279 A.D.2d 301, 303 (1st Dept. 2001); *Ying Fung Moy v. Hohi Umeki*, 10 A.D.3d 604, 605 (2d Dept. 2004) ("[a]ll that must be shown is the likelihood of success; conclusive proof is not required.").

While the Non-Party Teams have asserted multiple valid objections to the Subpoenas, to avoid burdening the Court, the Non-Party Teams have limited their discussion to just three of those objections.

First, Requests Nos. 13-18 and 22-27 seek all documents and communications regarding workers compensation and other claims against the NFL and/or any of the Non-Party Teams relating to any Alleged Brain Injuries, including the NFL's and the Non-Party Teams' analysis of such claims, including, *inter alia*, (a) any potential or actual lawsuits by any current or former player involving Alleged Brain Injuries; (b) the costs incurred to defend and/or settle the MDL Action and the Class Action Settlement; (c) the approval of the Class Action Settlement; and (d) any analysis of the NFL players' claims, the defenses to such claims, the valuation of such claims, and the potential or actual settlement of such claims. In short, the Insurers are seeking all damages-related documents relating to such claims, as well as privileged defense files.

However, these are precisely the categories of documents that are being adjudicated in this Court. These categories of documents should not be subject to inconsistent adjudications.

Second, Requests Nos. 29-30 seek all documents and communications regarding any indemnity agreements between the Non-Party Teams and the NFL. Again, Special Referee Dolinger denied the Insurers' demand that the NFL produce certain indemnification-related agreements between the Non-Party Teams based on the NFL's representation that "there is no indemnification agreement that would be pertinent to the current case, and that any obligations of the [Non-Party Teams] to indemnify the [NFL] under any scenario are reflected in the by laws of the [NFL], which have been produced to the carriers, along with the [NFL's] constitution" (Index No. 652813/2012, Dkt. No. 509 at 56). The Insurers are seeking these very same documents from the Non-Party Teams.

Third, Requests Nos. 1-12, 19-21, and 31-34 seek all documents and communications concerning any Alleged Brain Injuries. Based on the allegations and claims asserted in the MDL Action, the only relevant information is the NFL's knowledge concerning what the Insurers define as Alleged Brain Injuries. Thus, to the extent information was not conveyed to the NFL, the Non-Party Teams will take the position it is irrelevant to the Coverage Action. This determination should be made in one place, and it clearly makes sense for that place to be New York, where Insurers filed this action and where this Court and Special Referee Dolinger can best address the issues in proper context.

C. The Balance Of Equities Favor The Non-Party Teams

The balancing of the equities also favors the Non-Party Teams, as consolidating the 32 separate proceedings in one single forum before the Court most knowledgeable about the underlying action will conserve judicial resources, avoid duplicative and wasteful litigation and avoid potentially inconsistent rulings on the same discovery issues. The Insurers were totally

silent on enforcement of the Subpoenas for nearly five months and cannot claim any prejudice from delay. Moreover, there is no conceivable harm to the Insurers by granting the relief requested by the Non-Party Teams. Indeed, providing the Insurers with an ability to avoid this Court's prior discovery rulings by getting multiple bites at the apple in several other jurisdictions is hardly equitable.

D. The Non-Party Teams Should Not Be Required To Post Any Undertaking

The purpose of an undertaking is to cover the "damages and costs which may be sustained by reason of the injunction" if it is determined that the movant was not entitled to the injunction. CPLR 6312(b). Here, consolidation of all discovery proceedings before this Court cannot conceivably result in the Insurers – parties to the very Coverage Actions pending before this Court – suffering any damages or costs by reason of the injunction. Alternatively, if an undertaking is required, it should be set in a minimal amount.

CONCLUSION

For all of the foregoing reasons, the Non-Party Teams respectfully request that the Court issue a protective order: (a) directing the Insurers to withdraw or stay all other proceedings to compel compliance with the Subpoenas; (b) directing the Insurers not to commence any other proceedings to compel compliance with the Subpoenas; (c) consolidating all proceedings relating to the Subpoenas to a single proceeding before this Court, and (d) granting the Non-Party Non-NY Teams such other and further relief as this Court deems just and proper.

Dated: New York, New York
April 26, 2019

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CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

I certify that this affirmation complies with the 7,000-word limit under Commercial Division Rule 17. This computer generated memorandum of law was prepared using Microsoft Word, and based on Microsoft Word's word count function, the total number of words in this memorandum of law, including of point headings and footnotes and exclusive of the caption and signature block is 3,384.

Dated: April 26, 2019

SETH B. SCHAFLER